

Statement of
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Subcommittee on Telecommunications and the Internet
Committee on Energy and Commerce
United States House of Representatives
Hearing to consider H.R. ____, a Committee Print on the
Communications Opportunity, Promotion, and Enhancement Act of 2006
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Good morning, Chairman Upton, Mr. Markey, and members of the Subcommittee. My name is Paul Misener. I am Amazon.com's Vice President for Global Public Policy. Thank you very much for inviting me to testify on this important matter. I respectfully request that my entire written statement be included in the record.

I. INTRODUCTION

Mr. Chairman, the phone and cable companies are going to fundamentally alter the Internet in America unless Congress acts to stop them. They have the market power, technical means, and regulatory permission to control American consumers' access to broadband Internet content, and they've announced their plans to do so.

American consumers have little or no real choice of broadband Internet *access* and – unless Congress acts soon to reinstate modest safeguards recently removed by the FCC – consumer choice of broadband Internet *content* will be artificially limited. In my time this morning, I will describe the market power of network operators and the details of how they intend to extend that market power to limit consumer choice of content, such as movies, television, and music. I then will describe how the Committee Print (the “bill”) fails to confront this clear and present danger. Lastly, I will propose modest but effective safeguards to preserve American consumers’ longstanding freedom of Internet content choice.

We simply ask that Congress keep the telco and cable operators from taking their market power over broadband Internet access and extending it to market power over broadband Internet content.

Amazon.com, an Internet-based retailer with tens of millions of American customers, is involved in these discussions because we want to ensure that our customers retain the unimpaired ability to access the broadband Internet content of their choice, including that content available from Amazon.com. Currently, consumers pay for Internet access, and have the freedom to select lawful content from providers like Amazon, who themselves have invested billions of dollars in content and pay network operators millions of dollars a year for Internet access. We fear a circumstance in which broadband network operators, among whom consumers have no real choice, are permitted to prefer certain content and thereby limit consumer access to other content.

Other large companies, including eBay, Google, IAC/Interactive, Microsoft, and Yahoo, join Amazon in expressing this concern.

This is not just a big company concern, however. Earlier this month, six dozen entities, ranging from the AARP and the Consumer Federation of America, to Educause and Internet2, wrote to the full Energy and Commerce Committee to say that, “[w]hile it is appropriate for Congress to develop new legislation to promote competition among broadband networks, it must also ensure that consumers and providers continue to have the right to use those networks to send and receive content, and to use applications and services, without interference by network operators.” Amazon hopes that these views and, most importantly to us, the interests of our customers, will be thoroughly considered.

II. CONSUMERS HAVE LITTLE OR NO REAL CHOICE OF BROADBAND INTERNET ACCESS

Mr. Chairman, as much as we wish it were otherwise, consumers have little or no real choice of broadband Internet access. For the foreseeable future, nearly all Americans will have two or fewer providers available: the phone company, the cable company, or both. And, unfortunately, even the lucky consumers for whom multiple service providers are available will continue to face discouragingly high costs of switching among them. Equipment swaps, inside wiring changes, technician visits, long term contracts, and the bundling of multiple services all contribute to these costs.

Despite the common misconception that the Internet grew up in an unregulated environment, its growth and success were due in large measure to the extensive rules that governed its infrastructure until last year when the FCC issued its final wireline broadband order. Although many of these rules were outdated and worthy of deregulation, it makes sense to completely abandon longstanding non-discrimination requirements only if and when the market is truly competitive. The FCC believes that the market is competitive, but it is not.

Indeed, the FCC's data on the competitive availability of broadband access are fundamentally misleading. These data, which purport to show multiple broadband service providers in many areas of the country, completely obscure the realities faced by individual consumers. Unfortunately, however, these data also were the basis for the Commission's recent actions.

In the first place, the data count as high-speed broadband any services that deliver as little as 200 kbps in one direction. Although this may have been a reasonable definition of broadband a decade ago, it is preposterously slow today, incapable of delivering even standard definition live video, and *one five-hundredth* the speed being deployed to millions of consumers in Korea and elsewhere. Second, the geographic areas analyzed are zip codes, not individual neighborhoods or households. So while there may be three or four true broadband network operators (for example, two telcos and two cable companies) serving small separate areas in a zip code, no one consumer may have access to more than two of them (one telco and one cable company). And, third, the data

include lines of network operators that serve small businesses (for example, in office parks) but not residential neighborhoods.

The result of these misleading FCC data is that the amount of broadband consumer choice is portrayed as wildly optimistic, particularly when the aforementioned high switching costs are considered. If it really were easy for Americans to switch among five, six, or more true broadband Internet access providers, the market would be competitive and legislated consumer safeguards would be unnecessary.

What exists, unfortunately, is at best an oligopoly and, for the vast majority of Americans, a duopoly of the local phone and cable companies. Widespread deployment of alternative broadband technologies capable of high quality video remains a distant hope, and the promise of inter-regional local phone company competition is all but dead. In such oligopolistic conditions, firms easily can and do leave consumers with fewer services, higher prices, or both.

To be clear, we don't oppose network operators' entry into competing businesses so long as they are not allowed to leverage their market power over broadband Internet access to favor these ancillary endeavors. Also, we welcome broadband network operators' innovations within the network. With Moore's Law at work, network operators ought to be able to deploy innovative new technologies and services that, with increasing efficiency, provide benefits to operators and users alike. Moreover, we don't begrudge the phone and cable companies their current market power over the network.

Despite the longstanding desires and noble aspirations of policy makers, we're stuck with this super-concentrated broadband Internet access market for the foreseeable future.

Lastly, although we oppose the collection of monopoly rents, we certainly don't seek to deny network operators a healthy return on their investments. Content providers currently pay network operators for the amount of connection capacity they use, and network operators can charge consumers different prices depending upon how much bandwidth they use. This sort of connectivity "tiering" makes perfect sense. And, of course, network operators will charge consumers for the provision of any ancillary services, such as affiliated video content.

What we seek is more modest, yet far more important: We ask that Congress keep the telco and cable operators from taking their market power over broadband Internet access and extending it to market power over broadband Internet content.

III. CONSUMER CHOICE OF BROADBAND INTERNET CONTENT WILL BE LIMITED UNLESS CONGRESS ACTS

Mr. Chairman, unless Congress acts soon, American consumers will receive artificially limited choice of broadband Internet content. Phone and cable companies plan to restrict American consumers' access to such content based in large part on lucrative deals they intend to cut with third parties. Such business plans might be acceptable if consumers had meaningful choice among network operators. But, as described before, consumers have no meaningful choice.

In recent years, the FCC has reclassified broadband Internet access by wireline service providers, both telco and cable. Although the Commission adopted a policy statement that confirms the agency's statutory authority and possible intentions to act, the statement fails to address some likely discriminatory behaviors and, in any case, the FCC decided to make it unenforceable. So, with the exception of weak merger conditions that apply the FCC's policy statement to a few network operators, and expires for no apparent reason in 18 months (the market certainly won't be competitive by then), telcos and cable companies may artificially limit consumer access to content at will. Because consumer access to content is in jeopardy, Congress needs to act.

Just as it is clear that the network operators have the market power to limit consumer choice of broadband Internet content, it has become equally clear that they fully intend to do so. Not only have the telcos and cable companies stridently and steadfastly opposed any meaningful network neutrality rules, their most senior executives have, over the past six months (noticeably after the FCC's final reclassification actions), issued refreshingly honest statements that reveal their plans for limiting consumer access to content. Simply put, the network operators are planning to limit consumer choice of broadband Internet content based in part on deals they intend to strike with content providers. Although the network operators have been somewhat less clear on exactly *how* they intend to limit consumer access, their FCC filings and public statements reveal that they plan to do so in three key ways.

Before I describe the three key ways operators plan to limit consumer access to content, please allow me to summarize their technology plans. Although there are many differences among the technologies the duopoly network operators intend to use (hybrid fiber-coax by the cable operators and either fiber-to-the-home or fiber-to-the-node plus DSL twisted pair by the telco operators), all three technologies have been designed to operate the same way in practice, with two downstream components: a very high capacity (“fast lane”) cable-like private network component, and a much lower capacity (“slow lane”) downstream broadband Internet access component. The fast lane will be operated as a closed network, while the slow lane will be more (but, as it turns out, perhaps not entirely) open.

A. Specific Network Operator Plans

As best as we can tell, the network operators plan to artificially limit consumer choice of broadband Internet content in three essential ways: (1) a closed fast lane and an open slow lane; (2) paid ‘police escort’ *within* the slow lane; and (3) preferential “local on-ramps” *into* the slow lane.

1. Closed Fast Lane and Open Slow Lane. First, as noted before, each network operator has or is constructing a fast lane for their affiliated broadband content provided by a sister company and a slow lane for broadband Internet content provided by others. The fast lane they reserve for themselves is a closed, private network. This has always been the case for cable operators and, even for the telco operators deploying broadband, make no mistake: the overall broadband pipes they’re

deploying are mostly just another version of cable TV, not broadband Internet. Consumers should recognize that despite the nearly ubiquitous and puffy advertising, it's not about "your world, delivered," it's mostly about *their* world.

2. Paid Police Escort within the Slow Lane. Second, the network operators intend to offer paid prioritization (essentially a paid "police escort" in the slow lane) for broadband Internet content providers. Their plan is that, as content enters their slow lanes from an Internet or other network access point, the speed with which this content transits their network will be determined, in part, based on whether the content owner paid for prioritization. The terms of art the network operators use to describe this prioritization include "quality of service" and "tiering." Each term is intentionally confusing. No one is suggesting that certain types of services be denied prioritization, just like certain kinds of road traffic, like emergency services, deserve police escort. But such police escort should not be made available for a fee; otherwise those unable to pay the fee will always be stuck in traffic. Put another way, to prioritize some traffic is to degrade other traffic. It's a zero-sum game at any bottleneck. This fact is intentionally obscured by network operators, who incorrectly claim that they will not degrade anyone's content. Neutral prioritization (for example, network management whereby all live video receives priority above all text files) would be perfectly acceptable. But for an operator to offer priority to the highest bidder, the degradation of service to content providers who can't or don't pay is unfair, at best.

As should be obvious, small businesses will have a very hard time innovating if they need to pay for ‘police escort’ prioritization to compete. When some companies like mine have noted this previously, some of the network operators respond with something to the effect of “beware when big companies are looking out for the interests of little ones.” That response seeks to change the subject and obscure three key points. First, it doesn’t change the underlying fact that small entrepreneurs – facing a possible bidding war among big companies – are going to be hurt unless Congress does something now. Second, many of the big companies noting this imminent throttle on small company innovation were, indeed, innovative small companies only just a few years ago. And, third, on behalf of our customers, we want to ensure that our innovations – essentially new businesses operating in start-up mode by our employees – are not hindered in the same way. We merely want, as Vint Cerf so clearly puts it, “to innovate without permission” of the network operators. Surely the small start-up entrepreneurs of today want the same freedom to invent.

3. Preferential Local On-Ramps into the Slow Lane. Lastly, the network operators intend to offer downstream content injection (essentially “local on-ramps” for the broadband slow lane) to content providers who are willing to pay. This would enable content to be delivered from geographic locations closer to consumers and provide better user experiences. Such local on-ramps already are provided in a competitive access market by companies such as Akamai, which has servers distributed throughout the United States so that content can be delivered quickly to consumers, rather than having to traverse great distances on the Internet. Although content providers have

no expectation that such local on-ramps must be provided for free, network operators must not offer local on-ramps on discriminatory terms for affiliated traffic.

B. Network Operator Claims

So how do the network operators discuss these plans? They obfuscate. For example, most network operators say they won't, quote, "block" websites. This relatively new concession is neither noble nor comforting and, in fact, it is quite misleading. While they may not actually block access to a particular website, they easily could make that site's content unusable, either by overly constraining capacity (making the slow lane too slow); by providing prioritization only to those willing and able to pay (the paid "police escorts"); or by providing downstream injection (the local on-ramps) only on unreasonable or discriminatory terms. So it's a matter of semantics: they may never block content but still could make it unusable.

Other network operators say, dismissively, that this is a "solution in search of a problem," or that policymakers should wait for a problem to arise before acting. But what further proof is needed? The time to act is now. To ignore the network operators' economic and technical power, their strident and steadfast opposition to meaningful safeguards, their bold announced intentions, and their increasingly clear specific plans, is truly to turn a blind eye to an obvious and serious threat to consumers.

IV. THE BILL WOULD FAIL TO PRESERVE CONSUMER FREEDOM OF CHOICE OF INTERNET CONTENT

Mr. Chairman, the bill appropriately addresses the preservation of American consumers' longstanding freedom of choice of Internet content in the context of national video franchising relief. The principal reason for granting national video franchising relief is, of course, the introduction of additional video competition for consumers. It would be counterproductive, however, to facilitate the delivery of content of one additional competitor (the phone company), while limiting the availability of thousands of other competitors via the Internet. In the interests of competition and consumer choice, therefore, video franchising relief must not be granted without meaningful broadband Internet content safeguards; otherwise, consumers will receive *less*, not more, choice of content.

Unfortunately, Mr. Chairman, and with all due respect, the bill's provisions entitled "Enforcement of Broadband Policy Statement" are wholly inadequate to preserve American consumers' freedom of choice of Internet content. The underlying vague FCC statements of how consumers have various entitlements need strengthening and elaboration, or otherwise could result in invitations to litigation in which the courts, not Congress, make critical policy.

Most fundamentally, these provisions would *not* keep the network operators from cutting "paid police escort" deals that would adversely affect the traffic of other content providers who can't or don't pay. Entitling consumers to "access" content and services

does not clearly ensure that such content or services will be usable if it gets discriminatorily slowed in traffic. And these provisions would *not* keep the operators from insisting upon unreasonable or discriminatory terms for leasing “local on-ramps.” Entitling consumers to competition among content and service providers doesn’t clearly prohibit network operators from biasing the competition.

In short, the most likely and dangerous anti-consumer discriminatory behaviors of broadband network operators would not be thwarted by the provisions of the bill.

Moreover, as I noted in my testimony before this Subcommittee almost three years ago, and as the FCC recognized in its final wireline broadband reclassification order last August, the Commission does not need new authority to act in this area. What the FCC needs is to be *directed* by Congress to use its authority to prevent the network operators from artificially constraining American consumers’ choice of broadband Internet content. To deny the agency its general rulemaking and enforcement authority with respect to even the modest protections of the Commission’s earlier policy statement apparently disregards the operators’ power and intentions.

V. MODEST SAFEGUARDS WOULD PRESERVE CONSUMER FREEDOM OF CHOICE OF INTERNET CONTENT

Mr. Chairman, we respectfully ask that, in lieu of the current “Enforcement of Broadband Policy Statement” provisions of the bill, Congress insert and enact modest but effective safeguards to reinstate limited protections that the FCC recently abandoned, and

thereby preserve American consumers' longstanding freedom of choice of Internet content. Without much effort, these safeguards can be narrowly drawn so that operators' private networks are not invaded and so that operators are appropriately compensated for the services they provide.

Two essential consumer safeguards we seek can be summarized as follows:

- (1) Content transiting an operator's broadband Internet access network may be prioritized only on the basis of the type of content and the level of bandwidth purchased by the consumer, not ownership, source, or affiliation of the content. (That is, for traffic within the broadband network's Internet access lane, "police escort" may be provided only based on the kind of traffic and whether the consumer has paid more for a somewhat higher speed limit.)
- (2) The terms for local content injection must be reasonable and non-discriminatory; network operators must not be allowed to give preferential deals to affiliated or certain other content providers. (That is, "local on-ramps" into the Internet access lane need not be free, but the road owner must not charge unreasonable or discriminatory rates to favor their own or only some others' traffic.)

With these two modest safeguards, appropriately drafted and clarified, American consumers could be confident that their longstanding choice of lawful Internet content will not be limited by network operators.

VI. CONCLUSION

In conclusion, Mr. Chairman, the phone and cable companies are going to fundamentally alter the Internet in America unless Congress acts to stop them. They have the market power, technical means, and regulatory permission to control American consumers' access to broadband Internet content, and they've announced plans to do so.

For the foreseeable future, American consumers will have little or no real choice of broadband Internet access. And – unless Congress acts soon to reinstate modest and longstanding consumer safeguards – consumer choice of broadband Internet content will be artificially limited. I urge you and your colleagues to recognize that, despite how we wish it were otherwise, the market for broadband Internet access is not competitive and that the network operators fully intend to extend their market power to limit consumer choice of content. I also urge that you reject as inadequate the provisions of the bill and, instead, insert and enact modest but effective safeguards to preserve American consumers' longstanding freedom of Internet content choice.

Thank you. I look forward to your questions.

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